

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)
4) MUR 4999
5 Edward M. Bernstein and Associates, Inc.)
6 Edward M. Bernstein)
7 A Lot of People Supporting Ed Bernstein)
8 and Michael W. Kern, as treasurer)
9

10 **CONCILIATION AGREEMENT**

11
12 This matter was initiated by a signed, sworn, and notarized complaint by
13 John Mason. The Commission found reason to believe that Edward M. Bernstein and
14 Associates, Inc., Edward M. Bernstein, A Lot of People Supporting Ed Bernstein, and Michael
15 Kern, as treasurer (collectively, "Respondents"), violated 2 U.S.C. § 441b.

16 NOW, THEREFORE, the Commission and the Respondents, having participated in
17 informal methods of conciliation, prior to a finding of probable cause to believe, do hereby agree
18 as follows:

19 I. The Commission has jurisdiction over the Respondents and the subject matter of this
20 proceeding, and this agreement has the effect of an agreement entered into pursuant to
21 2 U.S.C. § 437g(a)(4)(A)(i).

22 II. Respondents have had a reasonable opportunity to demonstrate that no action should
23 be taken in this matter.

24 III. Respondents enter voluntarily into this agreement with the Commission.

25 IV. The pertinent facts in this matter are as follows:¹

¹ All of the facts recounted in this agreement occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 107-155, 116 Stat. 81 (2002). Accordingly, unless specifically noted to the contrary, all citations to the Federal Election Campaign Act of 1971, as amended (the "Act"), herein are to the Act as it read prior to the effective date of BCRA and all citations to the Commission's regulations herein are to the 2002 edition of Title 11, Code of Federal Regulations, which was published prior to the Commission's promulgation of any regulations under BCRA.

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

2004 APR -5 P 1:28

2004 APR -5 P 1:28

1 1. Edward M. Bernstein was a candidate for the U.S. Senate in Nevada during the
2 2000 Primary and General Elections.

3 2. A Lot of People Supporting Ed Bernstein ("the Bernstein Committee") is a
4 political committee within the meaning of 2 U.S.C. § 431(4) and was the principal campaign
5 committee of Edward M. Bernstein for the 2000 Senate election.

6 3. Michael W. Kern is the treasurer of the Bernstein Committee.

7 4. Edward M. Bernstein and Associates, Inc. ("Bernstein Law Firm") is a Nevada
8 corporation.

9 5. Edward M. Bernstein ("Mr. Bernstein") is the founder and 100% shareholder of
10 the Bernstein Law Firm.

11 6. Mr. Bernstein is the President of Explosive Media, the company responsible
12 for the creation and development of the Bernstein Law Firm television and billboard
13 advertisements.

14 7. The Federal Election Campaign Act of 1971, as amended ("the Act"),
15 defines a "contribution" as "any gift, subscription, loan, advance, or deposit of money or
16 anything of value made by any person for the purpose of influencing any election for Federal
17 office." 2 U.S.C. § 431(8)(A)(i). An "expenditure" is defined as "any purchase, payment,
18 distribution, loan, advance, deposit, or gift of money or anything of value made by any person for
19 the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i). "Anything
20 of value" includes all in-kind contributions, i.e., "the provision of any goods or services without
21 charge or at a charge which is less than the usual and normal charge for such goods and
22 services...." 11 C.F.R. §§ 100.7(a)(1)(iii) and 100.8(a)(1)(iv).

1 8. The Act prohibits corporations from making contributions or expenditures in
2 connection with any election, and also provides that no candidate or political committee may
3 knowingly accept or receive a contribution from a corporation. 2 U.S.C. § 441b(a).

4 9. An "independent expenditure" means an expenditure by a person expressly
5 advocating the election or defeat of a clearly identified candidate that is made without the
6 cooperation or consultation with any candidate or any agent or authorized committee of such
7 candidate. 2 U.S.C. § 431(17).

8 10. Expenditures made by any person "in cooperation, consultation or concert, with,
9 or at the request or suggestion of, a candidate, his authorized political committees, or their
10 agents, shall be considered to be a contribution to such candidate." 2 U.S.C. § 441a(a)(7)(B)(i).

11 11. For several years the Bernstein Law Firm ran television advertisements
12 throughout the state of Nevada featuring Mr. Bernstein as the Bernstein Law Firm's
13 spokesperson. In most cases, Mr. Bernstein was the lone spokesperson in the advertisements,
14 speaking on topics including, but not limited to, workers compensation laws, car accidents, and
15 social security disability benefits.

16 12. In a limited number of television advertisements that aired prior to 1998,
17 Mr. Bernstein appeared with attorneys, paralegals, and other employees of the Law Firm. In
18 these advertisements, attorneys, paralegals, and other employees discussed ways in which the
19 Bernstein Law Firm exercised sound customer service. At the end of each of these
20 advertisements, Mr. Bernstein appeared and made general statements about the Bernstein Law
21 Firm's practice.

1 13. On October 18, 1999, Mr. Bernstein filed a Statement of Candidacy with the
2 Commission as a candidate for United States Senator from Nevada.

3 14. In November 1999, the Bernstein Committee's media consultant alerted
4 Mr. Bernstein that his campaign was hurt by high negative ratings despite widespread name
5 recognition and advised the candidate that his polling numbers would only improve if he made
6 significant advertising buys on compelling positive image advertisements. Subsequently, the
7 Bernstein Law Firm pulled the advertisements in which he appeared from rotation in Nevada.
8 This activity occurred before he made his televised candidacy announcement. Further,
9 Mr. Bernstein directed the Bernstein Law Firm and Explosive Media to develop a new
10 advertising campaign in which he would not appear.

11 15. Starting in January 2000, the Bernstein Law Firm produced and developed
12 a new "Employee Testimonial" television advertising campaign to begin airing in late February
13 2000 that featured employees within the Bernstein Law Firm focusing only on Mr. Bernstein's
14 positive personal qualities and conveying the message that he had skills applicable to situations
15 other than the practice of law. Further, at various junctures of a given television advertisement,
16 the screen would fade to black and display messages such as "Ed Bernstein Cares," "Ed
17 Bernstein is Different," and "Ed Bernstein listens." Personnel from the Bernstein Committee
18 assisted the Bernstein Law Firm in creating these advertisements.

19 16. As a complement to its "Employee Testimonial" campaign, the Bernstein Law
20 Firm also created a new billboard campaign distinguishable from the previous billboards
21 displayed. Prior to the "Employee Testimonial" billboard, only Mr. Bernstein appeared in the
22 Bernstein Law Firm's billboard advertisements. By contrast, the new billboard featured what

1 appeared to be a family with a quote from a Bernstein Law Firm employee stating "Ed Bernstein
2 Cares." Personnel from the Bernstein Committee assisted the Bernstein Law Firm in creating
3 this billboard.

4 17. Respondents contend that Ed Bernstein believed based upon expert opinion that
5 he was required to remove his face and voice from commercials and billboards in order to
6 comply with Federal Communications Commission regulations. Mr. Bernstein exercised final
7 editorial approval over each of the scripts and billboard plans for the Bernstein Law Firm's new
8 television and billboard advertising campaign.

9 18. In March 2000, the Bernstein Committee's pollster and strategic advisor advised
10 the Bernstein Committee to make media advertising buys immediately, noting that such buys
11 could significantly enhance the credibility of the campaign.

12 19. Although the Bernstein Committee did not begin airing television advertisements
13 until June 5, 2000, nearly three months after its pollster and strategic advisor recommended
14 immediate advertising buys, the Bernstein Law Firm made substantial advertising buys for its
15 "Employee Testimonial" advertising campaign contemporaneous with Mr. Bernstein's
16 March 13, 2000 televised candidacy announcement, paying for these advertisements at far more
17 expensive air times than it had prior to Mr. Bernstein running for Federal office.

18 20. Mr. Bernstein approved the Bernstein Law Firm's increase in its advertising
19 buys.

20 21. The "Employee Testimonial" advertising campaign was shown in the Las Vegas
21 and Reno areas of Nevada between February 28, 2000 and August 2000.

1 22. Based on the interactions between the Bernstein Law Firm and the Bernstein
2 Committee regarding the content, timing, and increased media buy rates of the "Employee
3 Testimonial" advertising campaign, the Bernstein Law Firm's expenditures for these
4 advertisements were made for the purpose of influencing a federal election.

5 23. Respondents contend that Ed Bernstein did not intend to violate any law or
6 regulation and sought advice and counsel prior to changing these advertisements.

7 V. 1. Respondent Edward M. Bernstein and Associates, Inc. made prohibited in-kind
8 contributions to A Lot of People Supporting Ed Bernstein by coordinating certain advertising
9 expenditures with A Lot of People Supporting Ed Bernstein in violation of 2 U.S.C. § 441b.

10 2. Respondents A Lot of People Supporting Ed Bernstein and Michael Kern, as
11 treasurer, accepted prohibited in-kind contributions from Edward M. Bernstein and Associates,
12 Inc. by coordinating certain advertising expenditures made by Edward M. Bernstein and
13 Associates, Inc. in violation of 2 U.S.C. § 441b.

14 3. Respondent Edward M. Bernstein, as an officer of Edward M. Bernstein and
15 Associates, Inc., consented to the making of prohibited in-kind contributions to A Lot of People
16 Supporting Ed Bernstein by coordinating certain advertising expenditures with A Lot of People
17 Supporting Ed Bernstein in violation of 2 U.S.C. § 441b.

18 VI. 1. Respondents will pay a civil penalty in the amount of Twenty-Five Thousand
19 dollars (\$25,000) pursuant to 2 U.S.C. § 437g(a)(5)(A).

20 2. Respondents shall cease and desist from violating 2 U.S.C. § 441b.

1 VII. The Commission, on request of anyone filing a complaint under
2 2 U.S.C. § 437g(a)(1) concerning the matters at issue herein or on its own motion, may review
3 compliance with this agreement. If the Commission believes that this agreement or any
4 requirement thereof has been violated, it may institute a civil action for relief in the United States
5 District Court for the District of Columbia.

6 VIII. This agreement shall become effective as of the date that all parties hereto have
7 executed same and the Commission has approved the entire agreement.

8 IX. Respondents shall have no more than 30 days from the date this agreement becomes
9 effective to comply with and implement the requirement contained in this agreement and to so
10 notify the Commission.

11 X. This Conciliation Agreement constitutes the entire agreement between the parties on
12 the matters raised herein, and no other statement, promise, or agreement, either written or oral,
13 made by either party or by agents of either party, that is not contained in this written agreement
14 shall be enforceable.

1 FOR THE COMMISSION:

2 Lawrence H. Norton
3 General Counsel
4

5 BY:

Rhonda J. Vosdingh

6 Rhonda J. Vosdingh
7 Associate General Counsel

Date

5/10/04

8 FOR THE RESPONDENTS:

9 *[Signature]*
10 (Name)
11 (Position) *Attorney*

Date

3/31/04

24-04-407-4245